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Summary record of the 911th meeting

Held at Headquarters, New York, on Monday, 28 June 2010, at 10 a.m.

Temporary Chairperson: Mr. Sorieul (Secretary of the Commission)
later: Ms. Sabo (Vice-Chairperson) ..... (Canada)

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The meeting was called to order at 10.10 a.m.

Election of officers (*continued*)

1. **The Temporary Chairperson** recalled that Mr. Ricardo Sandoval (Chile), representing the Group of Latin American States, had been elected Chairperson of the Commission, but that he would not be present until the following week. The Commission had adopted the revised UNCITRAL Arbitration Rules under the chairmanship of the Vice-Chairperson of the Commission representing the Group of African States. As there were still openings on the Bureau and as the Vice-Chairperson representing the Group of African States was absent, he invited other regional groups to submit nominations for the office of Vice-Chairperson of the Commission.

2. **Ms. Smyth** (Australia), on behalf of the Group of Western European and Other States, nominated Ms. Kathryn Sabo (Canada) for the office of Vice-Chairperson of the Commission.

3. **The Temporary Chairperson** said that, upon her election, the Vice-Chairperson would not only chair the proceedings for the next three days, but would remain a member of the Bureau for a full year until the opening of the next session of the Commission.

4. **Mr. Nigam** (India), **Mr. Morán Bovio** (Spain), **Mr. Dennis** (United States of America) and **Mr. Riffard** (France) supported the nomination.

5. *Ms. Sabo (Canada) was elected Vice-Chairperson of the Commission by acclamation.*

6. *Ms. Sabo (Canada) took the Chair.*

Finalization and adoption of a draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property (A/CN.9/689; A/CN.9/700 and Add.1-7; A/CN.9/701 and A/CN.9/702)

7. **The Chairperson**, reporting to the Commission on the work of Working Group VI (Security Interests), said that the text submitted to the Commission was generally based on the structure and recommendations of the Legislative Guide on Secured Transactions. The task for the next three days was to review the Working Group's draft and to resolve all outstanding issues, notably the conflict rule, the issue of the applicable law and future work in the area of security interests. There were some other minor drafting issues as well as the title of the document which were still to be finalized.

8. The relevant documents for the purposes of the discussion were A/CN.9/700 and Add.1-7, which contained notes from the secretariat about the draft Supplement; document A/CN.9/701, which contained comments from States and organizations on the draft; document A/CN.9/702 and Add.1, which contained the ideas for future work; document A/CN.9/689, which was a report from the last session of the Working Group; and two conference room papers (A/CN.9/XLIII/CRP.7 and A/CN.9/XLIII/CRP.8).

A/CN.9/700

9. **Mr. Bazinas** (International Trade Law Division) said that, before the final adoption of the draft Supplement, the Commission might wish to consider its title, which was rather long. The Commission might also wish to consider those documents in the light of the comments made by the World Bank, the World Intellectual Property Organization (WIPO) and the European Community Trade Mark Association, as set out in document A/CN.9/701.

10. With regard to the preface of the draft Supplement, WIPO had made a suggestion to have the role it played in organizing the 2007 colloquium highlighted in the third paragraph to read: "... the secretariat organized, with the cooperation of WIPO, a colloquium ...". It had also requested that reference should be made, in the last paragraph of the preface, to the fact that it had attended the meeting as an observer. The suggestion was therefore to insert, after the words "organizations from the public and the private sector", the phrase "which attended its meetings as observers".

11. In discussing document A/CN.9/700, the Commission might wish to consider whether the notes to the Commission, which had been included to assist the Working Group in identifying the relevant references in the preparatory work for its section of the draft Supplement, should be retained or deleted. If retained, they would be completed with references to documents A/CN.9/700 and Add.1-7 and the relevant paragraphs of the Commission's report.

12. With respect to paragraph 13, reference was made to the fact that an encumbered asset was whatever right the grantor had in an asset and intended to encumber. The Commission might wish to confirm whether that

was an accurate statement, or whether there should be a differentiation between tangible and intangible assets.

13. **The Chairperson** said with regard to the title of the document, that the secretariat had suggested that the two segments of the title could be separated by a colon, or that a second line could be created for the second segment of the title. As there were no general statements regarding the Guide, she invited comments on the suggested title.

14. **Ms. Hu** Shengtao (China) said that she agreed with the secretariat's suggestion.

15. **The Chairperson** said she took it that the secretariat's suggestion was accepted.

16. *It was so decided.*

17. **The Chairperson** asked whether the notes to the Commission should be retained in the final version of the text or not.

18. **Mr. Nigam** (India) said that if the notes made cross-references to paragraphs in the main Legislative Guide or in the draft Supplement, then they should be retained in the draft Supplement too.

19. **The Chairperson** said that those notes were not cross-references to the Guide, but to previous versions of the draft Supplement and to reports of different sessions of the Working Group.

20. **Mr. Bazinas** (International Trade Law Division) said that, with regard to cross-references to other parts of the draft Supplement and the Guide, the Commission had to decide whether they should be included or even complemented. For example, in paragraph 4 of document A/CN.9/700, the second sentence referred to document A/CN.9/700/Add.1, paragraphs 8 to 21, which noted that issues relating to the existence, validity and content of a grantor's intellectual property rights were not addressed in the Guide. There might be a need to add another reference to document A/CN.9/700/Add.5, paragraphs 8 to 11, where the same point was raised.

21. At the end of the second line of paragraph 1 (A/CN.9/700), there might also be a need to add the words "as security for credit", because the enhancement of the value of intellectual property was in the context of secured transactions relating to intellectual property. While the next sentence clarified that point, it might well be that the text as currently drafted was too broad and therefore required that specification.

22. He noted that WIPO had suggested that, at the end of paragraph 32, reference should not be made to the exclusive rights of licensors or licensees, because only owners had exclusive rights. Consequently, it had proposed to either delete the word "exclusive" before the word "rights" in the last sentence, or to retain the word "exclusive" and change the word "licensor" to "owner", with "licensor" in parentheses, and then to refer to "an exclusive licensee", who would have exclusive rights.

23. WIPO had also suggested that the words "with the consent of the licensor" should be added at the end of the penultimate sentence of paragraph 41, because a licensee could only create security rights with the consent of the licensor.

24. With regard to secured transactions relating to intellectual property covered in paragraphs 35 to 45, those transactions could be divided into two broad categories. The first category consisted of transaction in which the intellectual property rights themselves served as security for the credit. The second category consisted of financing transactions that involved intellectual property in combination with other moveable assets, such as equipment, inventory or receivables. The World Bank had said that examples 1 through 5 given in paragraphs 37 to 43 illustrated those two broad categories. Examples 6 and 7, on the other hand, referred to transactions where the incumbent's assets were not intellectual property, but tangible assets that were subject to a security right.

25. To address that point, a heading could be inserted before paragraph 43, to separate that paragraph from the first five examples. The second sentence of paragraph 43, which read "This category of transactions is illustrated by examples 6 and 7 below", could also be modified as follows: "This category of transactions, illustrated by examples 6 and 7 below, involve security rights in tangible assets". The next sentence would clarify the point made in A/CN.9/700/Add.2, paragraphs 32 to 36, that a security right in a tangible asset did not automatically extend to the intellectual property used with respect to that asset, except if otherwise agreed by the parties.

26. At the end of paragraph 44 a sentence could be added as follows: "Bank F does not have a security right in the trademarks, unless the trademarks are

described specifically in the security agreement as encumbered assets". A similar sentence could also be added at end of paragraph 45.

27. **The Chairperson** said she took it that the notes to the Commission would be deleted in the final version of the draft Supplement but that cross-references to other parts of the Supplement would be retained with the appropriate editorial adjustments. She also took it that the Commission wished to amend the preface in line with the comments made by WIPO in document A/CN.9/701.

28. *It was so decided.*

29. **Mr. Agthe** (Observer for the International Trademark Association) said that his delegation agreed with the point raised by WIPO with regard to the last sentence of paragraph 32 of document A/CN.9/700 and proposed the following wording: "the expression 'transfer other than an outright transfer' may denote the granting of rights from a licensor to a licensee where the licensor retains some control over the use of the trademark".

30. **The Chairperson** suggested that, since the paragraph referred not only to trademarks but to intellectual property in general, the last part of the sentence should read "retains some control over the use of the intellectual property".

31. *It was so decided.*

32. **The Chairperson** invited comments on the secretariat's suggestion to add the phrase "with the consent of the licensor" to the end of the penultimate sentence of paragraph 41, in response to the comment made by WIPO in document A/CN.9/701.

33. **Mr. Nigam** (India) said that, in the example given in paragraph 41, it was necessary to specify what happened in the event of enforcement of the security interest: would the secured creditor be entitled to sell the entire software as it was? If not, that security interest would not be effective as far as the secured creditor was concerned. When a security interest was created over a licence obtained from a third party, it must be created along with the security interest over the other software developed by the developer, and the whole software must be given as a security. The third-party licence on its own could not be taken as a security because, once incorporated into the main software, it could not be sold without the approval of the licensor of the third-party software.

34. The same point applied to the example in paragraph 44: would the secured creditor be entitled to sell the designer jeans with the labels of the party which had given the licence to use the trademark? The question needed to be clarified because the use of the trademark might be subject to certain conditions, such as that sales should take place at a particular type of outlet for high-fashion goods; any such condition would also apply to the secured creditor when it wished to sell the jeans as an enforcement of security.

35. **The Chairperson** said that the section of the draft Supplement currently under discussion was intended only to give examples of financing practices; the clarifications suggested by the representative of India were covered in the commentary in the chapter relating to enforcement.

36. **Mr. Nigam** (India) said that, if the product was not sellable and did not give rise to a valid security interest for the secured creditor, it could not be given as a security. If a company had a piece of software that contained a software component licensed from a third party, but that third party had not given the secured creditor permission to sell that component in the event of the company's default, then the software was no longer a valid security for the lender. Similarly, it made no sense for a lender to accept designer jeans as a security if it could not sell them in the event of default because of conditions attached to the use of the trademark.

37. **Mr. Weise** (Observer for the American Bar Association) noted that there was a typing error in the suggestion made by WIPO regarding paragraph 41: "paragraph 57" should read "paragraph 52". He said that his delegation did not object to the substance of the suggestion; however, any additional language in paragraph 41 should correspond to paragraph 52, in that the latter paragraph stated that the licensor's consent was necessary only if the licence agreement provided that the rights of a licensee were non-transferable without the consent of the licensor. Paragraph 41 should not therefore suggest that the consent of the licensor was always required.

38. **Mr. Tosato** (Italy) said he agreed with the previous speaker that the wording of paragraph 41 should be consistent with that of paragraph 52 and that it should make clear that the licensor's consent for the licensee to use the licence as collateral was necessary only if the licence so stated in accordance with the

general principle that something was allowed unless it was expressly forbidden.

39. With regard to the remarks of the representative of India, his delegation had always considered it to be implied, in the example set out in paragraph 41, that the company using the software as collateral actually had the right to retransfer the licence and thus could use it as collateral; the secured creditor could therefore sell the licence in the event of default. However, if others felt that it would be clearer to restate that principle in the example, his delegation would not object.

40. **Mr. Bazinas** (International Trade Law Division) said that the examples of financing practices set out in the draft Supplement were not intended as complete examples of how a security interest was created and made effective against third parties, gained priority and was enforced. Rather, they were descriptions of practices that already existed and that were to be kept in mind when the issues of creation, third-party effectiveness, priority and enforcement were discussed in the draft Supplement. If a reference to enforcement were added, it might be argued that a reference to priority should also be added.

41. **Mr. Tosato** (Italy) said that the concerns expressed by the representative of India with regard to paragraph 41 might be addressed by adding wording to the second sentence indicating that company D had the right not only to sub-license software components to its customers but also to resell the licence. If that point was not expressly reflected in the text, it might be assumed that company D did not have the right to resell and therefore could not encumber that right because no one would want to take the licence as collateral without the right to resell that collateral in the event of default.

42. **Mr. Nigam** (India) said that he supported the Italian proposal.

43. **Mr. Brennan** (Observer for the Independent Film and Television Alliance), expressing support for the comments made by the representative of India, said that the statutes of several countries provided that non-exclusive licences were not transferable without consent. Therefore not only the licence itself but also the applicable law must be consulted in order to determine whether such consent existed. While he supported the proposal made by the representative of Italy, he said that an alternative solution might be to add a phrase to the last sentence of the paragraph in order to explain the purpose of presenting evidence to bank D, along the following lines: "to determine whether the licensee may grant a security interest".

44. **The Chairperson** said she took it that the Commission wished to amend paragraph 41 in order to make it consistent with paragraph 52, along the lines initially proposed by WIPO and with the modifications proposed by ABA. She also took it that the Commission wished to amend the last sentence of paragraph 41 along the lines proposed by the observer for the International Film and Television Alliance (IFTA). The secretariat would be asked to draft appropriate language.

45. *It was so decided.*

46. **The Chairperson**, drawing attention to the comment from the World Bank in document A/CN.9/701 that examples 6 and 7, in paragraphs 44 and 45 respectively, did not fall into the two broad categories mentioned in paragraphs 35 and 36, said that, in order to accommodate that comment, the secretariat had proposed that the following heading should be inserted before paragraph 43: "Security rights in intangible assets with respect to which intellectual property is used." In addition, the secretariat had proposed that the second sentence of paragraph 43 should be modified to read "this category of transactions, illustrated by examples 6 and 7 below, involves security rights in tangible assets", and that the words "except if otherwise agreed by the parties" should be added at the end of the third sentence. She took it that the Commission wished to adopt those proposals.

47. *It was so decided.*

48. **Mr. Bazinas** (International Trade Law Division) recalled his earlier proposal that a sentence should be added at the end of paragraphs 44 and 45 along the following lines: "Bank F does not have a security right in the trademarks unless the trademarks are described specifically in the security agreement as encumbered assets."

49. **Mr. Alcantara** (Observer for the Commercial Finance Association) said that he was confused by the proposed amendment to paragraph 44 because, as he understood it, the trademarks referred to in that paragraph were not owned by the grantor of the security interest but by third parties. Therefore, if the

secretariat's proposal was adopted, it would be necessary to state that the document granting the security interest had to refer specifically to the trademarks and that the third parties which owned the trademarks were the ones granting the security interest.

50. **Mr. Brennan** (Observer for the Independent Film and Television Alliance), expressing agreement with the comments made by the previous speaker, said that paragraph 44 did not specify that company F, the licensee of the trademarks, had the right to grant a security interest in the trademarks; that right would normally be reserved for the owner of the trademarks, in other words the licensor. He therefore did not understand the reason behind the proposed amendment. The important concept — namely that a licensee could not give more to a bank as security than it had actually received from a licensor — was already adequately expressed in the draft Supplement.

51. **Mr. Michael** (Observer for the Association of the Bar of the City of New York) said that, instead of adding the proposed sentence at the end of paragraph 44, the penultimate sentence of the paragraph could be amended along the following lines: "Company F provides bank F with its trademark licence agreements evidencing its right to use the trademarks and to grant a security right in goods bearing the trademarks and its obligations to the trademark owner." The purpose for the secured lender of looking at the licence agreement was to verify that the borrower not only had a valid right to use the trademark but, more importantly, had the right to pledge the trademark to the bank as part of the collateral, which could then be used by the bank if the licensee foreclosed on the collateral.

52. **Mr. Weise** (Observer for the American Bar Association) said that the proposed language referring to the right to grant a security right in goods bearing the trademark raised the question of whether the security right in the goods was still effective if the trademark was somehow destroyed. The more important point for the secured creditor was whether it had the right to dispose of the goods including the trademark on them. Perhaps the language could be adjusted to reflect that point.

53. **Mr. Umarji** (India) said that similar language about the grant of a security right in goods bearing a trademark would have to be added to paragraph 41, which dealt with software licensed from a third party.

54. **Mr. Bazinas** (International Trade Law Division) said that no matter what language was used, the creditor would have no security rights in the trademark unless the trademark itself was explicitly described as an encumbered asset by the trademark owner in an agreement.

55. **Mr. Umarji** (India) said that the owner of the trademark, by virtue of the licensing agreement with the manufacturer, authorizes the manufacturer to encumber the trademark as used in the goods bearing it.

56. **Mr. Cotten** (United States of America) said that it was not necessary to squeeze every caveat in the Guide into every example. Both the Association of the Bar of the City of New York and the American Bar Association had offered language intended to clarify that it was not the trademark, but the goods bearing it, that served as collateral for the financing. He suggested the following formulation: "Company F provides bank F with its trademark licensing agreements evidencing company F's rights to manufacture and dispose of goods bearing the trademarks and its obligations to the trademark owner." That would allow the lender in the example to satisfy himself that the borrower had the right to affix the trademark to the goods being offered as collateral without being misleading about the precise nature of the encumbered assets.

57. **Mr. Mittsdoerfer** (Germany) said that the language was still misleading because it gave the impression that the security right was in the goods, but what was important was that the security right was in the trademark.

58. **Mr. Tosato** (Italy) said as he understood it, examples 6 and 7 were supposed to involve tangible goods. If goods bore a trademark, then the creditor might encounter limitations in reselling them, but the security interest was still in the tangible goods, not the trademark.

59. **The Chairperson** said that it had been agreed to insert a heading before paragraph 43 indicating that the ensuing examples dealt with security rights in tangible assets with respect to which intellectual property was used.

60. **Mr. Alcantara** (Observer for the Commercial Finance Association) said that, as had been pointed out, there was no need to include all the technicalities in every example.

61. **Mr. Agthe** (Observer for the International Trademark Association) said that, while he agreed that not every example had to cover ever detail, in the example under discussion it needed to be clarified that the security interest was in the tangible goods. The licensee could under no circumstances grant a security interest to a third party in the trademark, which remained the property of the licensor.

62. **Mr. Mittsdoerfer** (Germany) said that he had merely intended to point out that the example highlighted the problems that could be involved in the disposal of goods bearing a trademark belonging to a third party. He had not meant to suggest changing the example.

63. **The Chairperson** said that if there was no objection she would ask the secretariat to revise the third sentence of paragraph 44 to read along the following lines: "Company F provides bank F with its trademark licensing agreements evidencing its right to use the trademark and to grant a security right in the trademarked inventory, and its obligations to the trademark owner". That would satisfy the need for an example that illustrated a security interest in tangible goods where an intellectual property right was involved. A similar change would be made in paragraph 45.

64. Turning to paragraph 48, she said that if there were no objections, in accordance with the suggestion of WIPO, the reference to "licensors or licensees" having exclusive rights would be deleted, because laws relating to intellectual property only accorded rights to the owner of intellectual property, not to licensors and licensees.

65. *Document A/CN.9/700, as orally amended, was adopted.*

A/CN.9/700/Add.1

66. **The Chairperson** said that a number of changes to document A/CN.9/700/Add.1 had been suggested by the World Bank and WIPO.

67. **Mr. Bazinas** (International Trade Law Division) said that WIPO had suggested that in paragraph 11 (g) the word "patent" in the clause "a person who first invented the patent" should be replaced with the word "invention". A new subparagraph (h) should be added, reading: "The transferability of patents and the right to grant a license". The World Bank had suggested that the following sentence should be added at the end of paragraph 17: "A State implementing the recommendations of the Guide may wish to address this question." There had also been an editorial suggestion for re-drafting the penultimate sentence of paragraph 20, which would be implemented by the secretariat.

68. *Document A/CN.9/700/Add.1, as orally amended, was adopted.*

69. **The Chairperson** said that the secretariat should be given a mandate to make non-substantive editorial changes. If there was any question about whether a particular change was substantive or not, it would be put before the Committee.

A/CN.9/700/Add.2

70. **The Chairperson** said that a number of minor modifications had been proposed to document A/CN.9/700/Add.2.

71. **Mr. Bazinas** (International Trade Law Division) said that there had been an editorial change to paragraph 32 that would be implemented by the secretariat. There was also a more substantive point with regard to that same paragraph, which was the question of whether it was appropriate to include the example of a car that might contain a chip that included a copy of copyrighted software.

72. **Mr. Morán Bovio** (Spain) said that the text could be retained, but stressed that what was important in the example was the chip, which was unique, rather than the car, which was the sum of various intellectual and industrial property inputs.

73. **Mr. Tosato** (Italy) agreed that the example of the car might be misleading, and might better be replaced by "design rights in the shape of the car". He also suggested that at the end of the paragraph, the word "product" should be changed to "component".

74. **Ms. Hu** Shengtao (China) said that the car should be retained because it was the only example involving manufacturing.

75. **Mr. Hallock** (United States of America) suggested that the emphasis on the chip could be highlighted while still retaining the example of the car by replacing the word "car" with the words "car or some other device".

76. *A/CN.9/700/Add.2, as orally amended, was adopted.*

A/CN.9/700/Add.3

77. **Mr. Bazinas** (International Trade Law Division) drew the Commission's attention to the comments by the World Bank and WIPO (A/CN.9/701).

78. The World Bank proposed a change to the fourth sentence of paragraph 9, to refer to a security right in intellectual property. In paragraph 29 the statement that the provision of less information in a general security rights registry than in an intellectual property registry was both an advantage and disadvantage was a duplication, and should be avoided.

79. WIPO considered that the reference to the Madrid Agreement concerning the International Registration of Marks (1891) and the Madrid Protocol (1989) should be moved from paragraph 13 to paragraph 14, which referred to relatively modern treaties or other international legislative texts that simplified the registration process.

80. **The Chairperson** said that she would take it that the Commission wished to adopt the amendments proposed by the World Bank and the World Intellectual Property Organization.

81. *It was so decided.*

82. *A/CN.9/700/Add.3, as orally amended, was adopted.*

A/CN.9/700/Add.4

83. **Mr. Bazinas** (International Trade Law Division) said that paragraphs 5 and 6 referred to two potentially inconsistent ways of dealing with the issue of the relevance of knowledge of prior transfers in terms of priority. In the compilation of comments (A/CN.9/701), the World Bank had proposed that wording should be added to paragraph 6 suggesting that States might consider harmonizing their secured transactions law and law relating to intellectual property with regard to that matter.

84. Regarding end-user licence agreements, referred to in paragraph 23, the World Bank suggested that they should be viewed as functional equivalents of sales of merchandise, while acknowledging that that might be controversial.

85. In paragraph 35, WIPO suggested that the question of whether or not a sub-licensee was duly authorized and the lack of protection under recommendation 245 of use of intellectual property by a sub-licensee were matters of contract law.

86. Lastly, regarding recommendation 245, the secretariat wondered whether explicit reference should be made to security rights in intellectual property.

87. **The Chairperson** invited comments on the suggestion by the World Bank, with regard to paragraph 6, that States might consider amending their intellectual property laws so as to make them consistent with the law recommended in the Guide.

88. **Mr. Agthe** (Observer for the International Trademark Association) said that while the International Trademark Association supported the harmonization of intellectual property law throughout the world, inclusion of the World Bank's suggestion for examination of intellectual property law went beyond the scope of the document, and should not be accepted.

89. **Mr. Brennan** (Observer for the Independent Film and Television Alliance) agreed that making such a change without full consideration of all the parameters involved would not be appropriate.

90. **Mr. Riffard** (France) said that his delegation was sympathetic to the substance of the proposal, which would increase the utility of the draft Supplement. However, considering that the Commission had already taken a decision in respect of recommendation 4 (b), and that acceptance of the World Bank's suggestion would amount to reopening discussion of the matter, his delegation was not in favour of accepting it.

91. **Mr. Umarji** (India) noted that elsewhere in the draft Supplement States were invited to consider harmonizing their intellectual property and secured transactions law, in view of which he saw no difficulty in accepting the suggestion.

92. **The Chairperson**, noting the lack of agreement, said that at the stage matters had reached it would be preferable not to accept the suggestion by the World Bank.

93. *It was so decided.*

94. **Mr. Du** Jun (China) said that paragraph 5 stated that earlier registration created priority whether or not there was knowledge of an earlier security right, which reflected normal trade practice. He wondered whether

paragraph 6, by requiring prior knowledge, imposed a further condition, thereby undermining the efficacy of the registry scheme. In any event, there appeared to be an inconsistency between the two paragraphs.

95. **Mr. Bazinas** (International Trade Law Division) said that the Working Group had understood that there was a potential inconsistency between knowledge-based priority rules under secured transactions law and under intellectual property law and that knowledge-based rules might undermine the efficacy of registration. However, the Working Group had concluded that if such a rule under intellectual property law applied specifically to a security right in intellectual property, then knowledge-based priority would be preserved, since recommendation 4 (b) provided for deference to intellectual property law. The World Bank's suggestion had been made in recognition of the fact that States might wish to harmonize secured transactions law and intellectual property law in order to avoid such an inconsistency.

96. **The Chairperson** invited the Commission to consider the World Bank proposal in respect of paragraph 23.

97. **Mr. Cohen** (United States of America) agreed with the World Bank that its suggestion regarding paragraph 23 was controversial, in view of which his delegation could not support it.

98. **The Chairperson** said that she would take it that the Commission did not wish to accept the World Bank proposal in respect of paragraph 23.

99. *It was so decided.*

100. **The Chairperson** invited the Commission to consider the suggestion made by WIPO in respect of paragraph 35.

101. **Mr. Weise** (Observer for the American Bar Association) said that the issue was in fact a matter of intellectual property law and not of contract law. Under contract law, if a licensee was contractually bound not to enter into sub-licences but did so, the licensee might be in breach of its master licence. In that circumstance, under contract law, the sub-licence might still exist. However, under intellectual property law, an unauthorized sub-licence could not come into existence. Accordingly, the text should not be changed to refer to contract law or the law of obligations.

102. **Mr. Brennan** (Observer for the Independent Film and Television Alliance) said that the term "authorized" could be interpreted differently under the law of obligations and under intellectual property law and was thus better avoided. He requested an explanation of the words in parentheses at the end of paragraph 35, since it was not clear that they were necessary.

103. **Mr. Cohen** (United States of America) agreed that the statement in parentheses was an unnecessary statement about contract law, and would be better deleted.

104. **The Chairperson** invited the Commission to consider whether the reference to the law relating to intellectual property should be retained in the final sentence of paragraph 35.

105. **Mr. Umarji** (India) said that in the circumstances outlined in the paragraph, relating to the granting of a licence for a specific purpose, the law relating to intellectual property governed the granting of a licence. Should a sub-licensee use the licence for some other, unauthorized, purpose, the law relating to intellectual property was still relevant. Accordingly, the current drafting should be retained.

106. **Mr. Du** Jun (China) said that if the relevant law was that of intellectual property, the language should be retained so that each country could use its national legislation as a legal basis for taking action. His delegation did not see that the language in parentheses in paragraph 35 conflicted with the rest of the paragraph, and felt that it could be retained.

107. **Mr. Cohen** (United States of America) said that if the Commission wished to retain the language in parentheses, thereby giving additional advice relating to contractual obligations, that advice should be full and accurate. While it was the case that under many legal systems failure by one party excused the other, that was not the case in systems where the two parts of a contract were independent of each other, so that failure of a licence, for example, would not excuse performance by another party but would give rise to a breach of contract. Which of those rules applied was dependent on circumstances under many legal systems. Therefore, to suggest that there was only one rule, applicable worldwide, was an inaccurate oversimplification. His delegation viewed the language as a distraction from the main point of the paragraph, but, if it was to be retained, it should be expanded to a more complete statement.

108. **Mr. Tosato** (Italy) said that his delegation agreed with the representative of the United States. The point made in the paragraph was abundantly clear, and nothing was lost by deleting the language in parentheses. If retained it would need to be made more complete and more accurate, and would then divert attention from the aim of the paragraph. It was better deleted.

109. **The Chairperson** said that, given the views expressed by members, she would take it that the Commission wished to delete the language in parentheses.

110. *It was so decided.*

111. **The Chairperson** reminded the Commission that the question had arisen of whether it would be appropriate to include in recommendation 245 a reference to a security right in intellectual property.

112. **Mr. Umarji** (India) said that such a reference such be added to make the position clear.

The meeting rose at 1.05 p.m.